



REPUBLIC OF KENYA

High Court at Eldoret

Environmental & Land Case 922A of 2012

MAINA WAHOME PLAINTIFF

VS

ESTHER CHEROP MUREY & 6 OTHERS.....DEFENDANT

(Application for injunction; principles upon which the court will determine an application for injunction; plaintiff being registered owner of the suit land through transmission; plaintiff seeking to have orders of injunction issued against the defendants; 1st-6th defendants claiming to have purchased suit land and that they have been in possession since 1992; 1st-6th defendants filing counterclaim for adverse possession; 7th defendant claiming to have purchased the land from the plaintiff which was admitted in his witness statement; misleading deposition by plaintiff with regard to when defendants came into possession; whether injunction ought to issue in the circumstances; balance of convenience; status quo to be maintained pending hearing of suit)

RULING

The application before me is the Motion dated 17 October 2012 filed by the plaintiff. It is an application brought under the provisions of Order 40 rule 1 (a) of the Civil Procedure Rules, 2010 and Section 3A of the Civil Procedure Act. The applicant seeks orders of injunction to restrain the seven defendants from selling, offering for sale, cultivating or dealing with the land parcel Uasin Gishu/ Kondoo/560 pending the hearing of the suit. The applicant also seeks orders to restrain all further registration or change of registration in the ownership of the suit land and that the government department and all registration authorities be prohibited until further orders of the court. The application is supported by the affidavit of the plaintiff. The same is opposed by the defendants.

This being an application for injunction, I stand guided by the principles laid out in the case of **Giella v Cassman Brown (1973) EA 358**. In the said case, the court of appeal stated that before a court grants an order of injunction, it needs first to be satisfied that the applicant has laid out a prima facie case with a probability of success; secondly, be alive to the tenet that an injunction will not normally be granted unless the applicant stands to suffer loss which cannot be compensated by an award of damages; and finally if in doubt, decide the application on a balance of convenience.

The starting point in an application for injunction is therefore to determine whether the applicant has laid out a prima facie case with a probability of success.

My own assessment of a prima facie case is that it is a case so demonstrated at a preliminary stage, which would most likely entitle the applicant to succeed after the hearing of the main suit, assuming that all matters remain constant. An assessment of whether or not an applicant has demonstrated a prima facie case is inevitably made from an assessment of the pleadings and supporting material of the applicant.

Where the respondent has filed defence and opposing material to the application, the assessment of whether a prima facie case has been demonstrated by the applicant must be made in light of the pleadings and material placed by the respondent.

The plaintiff commenced this suit by way of plaint and contemporaneously with the plaint, he filed this application for injunction. In his plaint, the plaintiff has pleaded that he is the registered proprietor of the land parcel Uasin Gishu/Kondoo/560 measuring approximately 2.6 Hectares. He has pleaded that he obtained registration by way of transmission, the said land having formed the estate of Annah Wanjiku Nduati (deceased), who was mother to the plaintiff. He has pleaded that on unknown dates in the year 2012, the defendants invaded the suit land and parceled it into 7 plots claiming to have purchased the same from a third party. He has pleaded that the defendants' actions of invading the suit land and subdividing it haphazardly amongst themselves amounts to trespass and false detainer of land. The plaintiff has in his prayers sought an order of eviction of the defendants from the suit land and an order of permanent injunction to restrain the defendants from utilizing the suit land. He has also sought mesne profits at the rate of kshs.5,000/= per acre per year since 2012 until the determination of the suit, alongside costs and interest.

In his supporting affidavit, the plaintiff has annexed a copy of the title deed to the suit land which shows that he became registered as proprietor on 28 March 2012. He has also annexed a Certificate of Confirmation of Grant in Succession Cause No.188 of 2010 for the estate of Annah Wanjiku Nduati (deceased) which was issued to him. The same indicates three properties all transmitted to the plaintiff who is named as the sole beneficiary. One of the properties is the suit land herein. The plaintiff has repeated that the defendants invaded his land on the malicious claim that they bought the same from his sister and his late mother which he has disputed.

The defendants upon being served, entered appearance and filed a joint statement of defence and counterclaim. They also filed replying affidavits to the application. The 1st defendant swore an affidavit on behalf of herself and the 2nd-6th defendants whereas the 7th defendant filed an independent replying affidavit.

In their defence, the defendants have refuted the plaintiff's claims and have put him to strict proof. They have pleaded that the plaintiff's title is subject of a challenge by way of revocation/annulment of the grant obtained in Eldoret Succession Cause No.188 of 2010. They have further pleaded that the plaintiff's suit is barred by Section 7 of the Limitation of Actions Act, CAP 22, as they have been in occupation of the suit land since 1992. They have pleaded that the title of the late Annah Wanjiku Nduati was extinguished by way of adverse possession and no valid title could pass to the plaintiff in 2012. It is also pleaded that the plaintiff sold one acre of the suit land to the 7th defendant and he is now stopped from claiming the same.

The defendants have also averred that the dispute herein is res judicata as the same was adjudicated upon by the Land Disputes Tribunal in Case No.6 of 2010 where it is claimed the plaintiff lost and was ordered to sub-divide the land and convey the same to the defendants.

In their counterclaim, the defendants have pleaded that the plaintiff's title was obtained fraudulently as he failed to disclose the interests of the defendants in the succession matter. They have repeated that they have been in occupation of the suit land in excess of 12 years and have sought a declaration that the title of Anna Wanjiku Nduati had been extinguished by the time the plaintiff acquired the same by transmission. They have sought the plaintiff's title to be cancelled and the defendants to be registered as proprietors.

In their replying affidavit, the 1st-6th defendants have annexed the proceedings described to be proceedings of Land Dispute Case No.6 of 2010 between Maina Wahome (as claimant) and Mariamu Muthoni Mwangi (described as Objector). They have also annexed a copy of Summons for Revocation and/or Annulment of Grant filed in Eldoret Succession Cause NO. 188 of 2010.

On her part, the 7th defendant has averred that the plaintiff had sold to her one acre of the suit land and has annexed a copy of an agreement dated 11/11/2005 to support her claim. She has deponed that the

plaintiff having admitted that he sold to her one acre of land is now estopped from asserting otherwise.

The plaintiff sought leave to file a supplementary affidavit which was granted. In his supplementary affidavit, the plaintiff has denied the existence of land dispute tribunal case No.6 of 2010 and has annexed proceedings of LDT Case No.6 which shows that the dispute therein was between parties different from those in the present suit. He has also averred that if at all there were proceedings, the same are invalid and in any event the award therein has not been adopted by court. He has denied ever being served with any summons to revoke/annul the grant and has asserted that no order has been issued to suspend the said grant. With regard to the alleged purchase by the 7th defendant, the plaintiff has averred that the same is a nullity and void for lack of conformity with the provisions of the Land Control Act (CAP 302) Laws of Kenya.

The application was argued before me on 14 March 2013. Mr. Ngigi, learned counsel for the applicant urged me to allow the application. He argued that as registered owner the Land Registration Act, Act No.3 of 2012, deems the plaintiff as the prima facie owner of the suit land. He asserted that the defendants have no good title as any alleged purchase of the land is void for lack of consent of the Land Control Board. With regard to the possession of the defendants, counsel argued that the same was extinguished when the previous owner died and once the plaintiff became registered, time must be deemed to start afresh.

On his part, Mr. Barasa, learned counsel for the defendants urged me to dismiss the application. He asserted that the defendants have been in occupation since 1992 which fact he said has not been disputed. He argued that the dispute had been resolved before the land disputes tribunal which found in favour of the defendants. He argued that this decision has not been challenged. He also asserted that by the time the plaintiff was obtaining title, the same had been extinguished by time. He also argued that the plaintiff was stopped from asserting any claim against the 7th defendant as he has admitted through his witness statement that he sold one acre to the 7th defendant.

I have considered the application and the submissions of counsel. As I stated earlier, to determine whether the applicant has established a prima facie case, his claims must be gauged against the responses of the defendants. It is not in doubt that the plaintiff is the registered owner of the suit land. However, the defendants have challenged the plaintiff's title in four ways. First, the defendants have argued that the plaintiff obtained the title to the suit land fraudulently by non-disclosure of material facts before the succession court and have asserted that they have now filed an application to annul the plaintiff's grant. The second challenge is that they have been in occupation of the suit land since 1992 and that by the time the plaintiff obtained title the same had already been extinguished by dint of the doctrine of adverse possession. The third challenge is that this suit is res judicata. The fourth challenge is peculiar to the 7th defendant who has claimed that the plaintiff sold to him one acre of the suit land, a fact that he (the plaintiff) has admitted in his witness statement, and the 7th defendant now argues that he (the plaintiff) is now estopped from claiming otherwise.

Let me deal with the first challenge. It is open for a party to make an application for annulment and/or revocation of a grant issued in respect of the estate of a deceased person. However, unless and until such grant is revoked or affected in one way or another, the same remains valid. The fact that the defendants have filed an application for annulment/revocation of grant, in my view does not affect the proprietary rights of the plaintiff over the suit land. The plaintiff as registered proprietor, is entitled to enjoy all proprietary rights unless and until his title is revoked. This may happen or may not happen depending on what decision the court handling the succession matter will decide. The fact that an application for annulment has been filed, in my view, does not affect the proprietary rights of the plaintiff. The mere filing of an application for annulment of grant is not good enough. On my part I cannot speculate on whether or not the grant will be annulled/revoked. Until it is annulled/revoked, I must regard it as standing and properly issued.

Before I go to the second challenge, I can quickly dispose of the third and fourth challenges. The fourth challenge is peculiar to the 7th defendant. I have seen from the plaintiff's witness statement an admission that he sold one acre of the suit land to the 7th defendant. However, this does not mean that the plaintiff is

estopped from challenging the legality of the said sale. An admission that he sold a portion of the suit land does not disentitle him from challenging the validity and legality of the sale. In this instance, the plaintiff has specifically asserted that the sale is void for want of consent of the land control board. I think this is a valid argument which the plaintiff is perfectly entitled to raise to support his case that the 7th defendant is not entitled to possess the suit land.

The third challenge is that the suit herein is res judicata because the matters herein were adjudicated by the Land Disputes Tribunal in Tribunal Case No.6 of 2010. I have perused the proceedings of the said case annexed by the defendants. The proceedings therein were between the plaintiff and his sister one, Mariam Muthoni Mwangi. None of the defendants herein were parties to those proceedings. It cannot therefore be said that the matters in this suit have already been adjudicated in another forum before. Moreover, there is no indication that the award of the said land disputes tribunal was ever adopted by the court and a decree issued. There is therefore no decree flowing from the said award and the award cannot be said to be enforceable in the state that it is in. I cannot therefore agree with the defendants that the present suit is res judicata.

I think the more serious challenge is the 2nd challenge, the pleading that the plaintiff's rights over the suit land have been extinguished by limitation of time and that the defendants are entitled to the suit land by way of adverse possession. The plaintiff's case is that the defendants invaded the suit land sometimes in the year 2012. I do not think this position is correct. It is discernable from the proceedings of the land disputes tribunal, that the plaintiff was alive to the defendants' claims over the suit land and their occupation on the same. These proceedings were held in the year 2010 and it appears that as at 2006 the plaintiff intended to file suit against the defendants to evict them from the suit land. I cannot at this stage say with certainty that the defendants have been on the suit land from the year 1992 but there is no question that they have been on the suit land a good number of years prior to the year 2012 contrary to what is alleged by the plaintiff. Mr. Ngigi made the argument that time began to run afresh when the plaintiff obtained title. This position is however not supported by law or authority. The correct legal position is that time does not cease to run despite change of proprietorship (See for example the case of *Githu v Ndeete (1984) KLR 776*).

The 1st -6th defendants have pleaded that they have been on the suit land since the year 1992. I think I have to give them the benefit of doubt that they have been on the suit land since the said year as I have been unable to agree with the allegations of the plaintiff that they have only been on the land from the year 2012. The plaintiff had deponed that prior to the land being registered in the name of his late mother, it was under the Settlement Fund Trustees (SFT). He annexed certain receipts being payments to the SFT and a letter from the District Land Adjudication/Settlement Officer of Uasin Gishu District. There is therefore no doubt that the land was initially owned by the SFT before devolving to the deceased. It is now settled from the court of appeal authority of *Gitu v Ndungu (2001) 2 EA 376*, that one cannot allege adverse possession on land that is registered under the SFT and time for calculating possession for purposes of founding a claim of adverse possession does not begin to run so long as the land is under the SFT. The plaintiff has not however provided the period when the land devolved from the SFT to his late mother. Neither did the defendants in their counterclaim annex a copy of the register of the suit land which is a mandatory requirement when making a claim for adverse possession. The copy of the register would have provided the time that the land devolved from the SFT to the deceased which would have been the time from which time would start running in favour of the defendants.

Given the above scenario, the strength of the case of the plaintiff against the 1st -6th defendants is in doubt. So too the strength of counterclaim of the 1st-6th defendants against the plaintiff. It is also regretful that the plaintiff chose to be untruthful in his pleadings with regard to the time that the defendants moved into possession of the suit land. It is incumbent upon any party who seeks the discretion of the court to come to court with clean hands and to be honest on the facts pleaded and deponed. I would probably have been inclined to issue an injunction against the 7th defendant if it were not that the plaintiff has been dishonest in his pleadings and depositions in his affidavit with regard to the period that the defendants have been in possession.

It is my view that given the scenario herein, I need to decide this application on a balance of convenience.

The balance of convenience is in favour of the defendants who are in possession of the suit land. I direct that they remain in possession of whatever portions of land they occupy until the final determination of this suit. The costs of this application shall be costs in the cause.

It is so ordered.

DATED and DELIVERED THIS 18 TH DAY OF APRIL 2013

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT & LAND COURT AT ELDORET

Delivered in the presence of:

Mr. A.M. Ngigi of M/s Ngigi Mbugua & Co Advocates for the plaintiff.

Mr. Y.M. Barasa of M/s Wambua Kigamwa & Co Advocates for the defendants.